IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.184 OF 2003.

Kadamba Transport Corporation
Limited, having its Office at
Kadamba Bus Stand, Panaji, Goa,
a Company incorporated under the
Indian Companies Act, 1956,
through its Managing Director ... PETITIONER

VERSUS

1. Shri Yeshwant Damodar Divkar,
major, married, Indian National,
resident of H.No.367,
Borda, Margao, Goa;

2. The Industrial Tribunal
of Government of Goa,
Junta House,Panaji,Goa ... RESPONDENTS.

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Mr. D.B. Ambeker, Advocate for the Petitioner.

Mr. M.S. Sonak and Ms. Pooja Bharne, Advocates for the Respondent No.1.

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**CORAM : F.I. REBELLO,J.**

DATED : JUNE 12, 2003.

ORAL JUDGMENT

Rule. Respondents waive service. Heard forthwith.

2. Petitioner is aggrieved by the award of the Industrial Tribunal dated 14-8-2002. By the said award the Industrial Tribunal answered the reference in favour of the Respondent workman and consequently directed reinstatement with 40 per cent of back wages from the date of termination of the

services till the date of the award with all the consequential benefits and continuity of service.

3. A few facts may be set out. The Respondents was appointed as a Cashier-cum-L.D.C. by the Petitioner with effect from 27-9-1982 and was placed on probation vide Order dated 17-10-1984. He fell sick on 3-11-1985 and was under treatment at Margao Hospicio Hospital from 5-11-1985 to 11-11-1985 and thereafter at ESI Medical Hospital from 12-11-1985 to 20-11-1985. On being declared fit he reported for duties on 21-11-1985 and submitted all his medical certificates. The Respondent worked in the morning sessions and was paid unpaid wages for the month of October 1985 and also signed the muster roll. The case of the Respondent was that after lunch break when he came to resume duties he was stopped by the security personnel who told him that he had instructions from the Depot Manager to remove him physically if he refused to leave the depot. It is in these circumstances that the Respondent had to leave the depot premises. On the very same day he sought to meet the Managing Director with complaint dated 21-11-1985. As he could not meet the Managing Director on the same day or on the following day, he delivered the complaint in the Office of the Depot

Manager. He received a charge-sheet dated 21-11-1985 on 2-12-1985 from the Depot Manager. He replied to the same by his letter dated 5-12-1985. Respondent received a letter dated 23-12-1985 from the Personnel Manager. The said letter was received by him on 26-12-1985 after which though he was sick he went to the Depot Manager and informed him about his sickness. Before he could reply to the letter dated 23-12-1985 he received a letter dated 3-1-1986 from the Petitioner informing him that his name is deleted from the muster roll with effect from 3-1-1986 relying upon Standing Order No.24-A(2). The Respondent on being declared fit to resume duties submitted a letter dated 29-1-1986 in the Office of the General Manager & Administration on 30-1-1986 and offered himself for duties and also produced medical certificate in support of his sickness from 24-12-1985 to 29-1-1986. He was informed that he would be intimated about his duties. However, he received no communication. It is not necessary to advert to the other averments. Suffice it to say that it was the case of the Respondent that the Standing Order would not apply to him. Even if they were applicable the Respondent had to be given an opportunity of giving his explanation before the Petitioner could invoke the said Standing Order. That was not done. At any

rate it is contended that the termination would amount to retrenchment and since the provisions of Section 25F of the Industrial Disputes Act were not complied with, the termination was illegal, void and bad in law. Respondent workman claimed reinstatement in his service with full back wages.

4. The Petitioner filed the written statement. Various events in the course of the Respondent's employment and warnings issued to the Respondent have been adverted to. It is the case of the Petitioner that to give the Respondent workman a chance to improve his work, there was reshuffling of assignment which the Respondent refused to accept and started remaining absent. A memo was issued on 4-11-1985 which also the workman refused to accept. The Respondent continued remaining absent at the work place and failed to carry out the assignment given to him in the memo dated 1-11-1985. On 7-11-1985 when the workman visited the Depot, attempt was made to serve the memo which the Respondent refused to accept and continued to remain absent without giving intimation for doing so. The Petitioner's case is that the workman came to the Depot on 21-11-1985 and collected his salary for the month of October, 1985 and received the Memos dated 1-11-1985 and 4-11-1985

but did not receive his dues. Therefore a charge-sheet dated 21-11-1985 was issued to the Respondent and the same was sent by register ed A/D post. It is the case of the Petitioner that the workman tried to create a false record ;of having reported for duties on 21-11-1985 by writing letter to the General Manager. In these circumstances, a letter was sent to the workman dated 23-12-1985 asking to report for duties immediately. The Respondent did not do so and consequently action was taken against the Respondent under Standing Order 24-A(ii).

5. The learned Industrial Tribunal framed several issues. After assessing the evidence, the learned Industrial Tribunal recorded a finding of fact that Respondent was sick from 5-11-1985 to 19-11-1985. In these circumstances,it was held that the Respondent was unable to attend his duties during the said period. The Industrial Tribunal further gave a finding that on 21-11-1985 the Respondent resumed duties. Insofar as the issue whether he was prevented from continuing his duties in the second half is concerned, the learned Industrial Tribunal held in the negative. Insofar as the issue whether the Petitioner proves that the Respondent workman remained absent without

intimation or prior permission for a period exceeding thirty days and consequently is deemed to have resigned from service, it was held that it was not proved by the Petitioner. The learned Tribunal accepted the contention of the Petitioner that by letter dated 23-12-1985 he had asked the workman to resume duties. The issue as to whether the Memo dated 5-1986 amounted to resignation and not termination was answered by holding that it amounted to termination and consequently the relief as adverted to earlier.

6. At the hearing of the Petition, on behalf of the Petitioner, it is contended that the Respondent remained absent from duty and consequently considering the Standing Order 24-A(ii) is deemed to have voluntarily resigned from his job. It is contended that the learned Industrial Tribunal did not address itself to the correct questions to be answered and in view of that the award is liable to be set aside. It is their contention that a Standing Order similar to Standing Order 24A(ii) had been considered by the Apex Court in the case of **The Buckingham and Carnatic Co. Ltd. v. Venkatiah and another** [1963(4) SCR 265]. It is therefore contended that the Respondent had voluntarily resigned and consequently the award of the

Industrial Tribunal is liable to be set aside. It is also contended that the finding recorded that the Respondent was on sick leave is contrary to the record and on that count also the award is liable to be set aside.

On the other hand, on behalf of the Respondent workman it is contended that the finding recorded on the Respondent's absence is a finding of fact. The writ Court in the exercise of its extraordinary jurisdiction should not interfere with the findings of fact unless the findings are based on no evidence or by ignoring evidence and/or are perverse. In their case it is contended that it is not so. It is further contended that termination under Standing Order 24-A(ii) would amount to retrenchment. The Petitioner had not complied with the requirements and consequently the Order of termination is null and void. It is further contended that the Standing Order like the Standing Order referred to in the case of a permanent workman could not have been referred to to terminate the services of the Respondent, unless opportunity was given. No opportunity was given. Reliance is placed on judgments which will be adverted to in the course of the arguments.

7. In the first instance, the relevant Standing Order based on which the Respondent's service with the Petitioner stood terminated reads as under:-

> "If any workman remains absent without intimation or prior permission for a period exceeding 30 days, he shall be deemed to have resigned from the services and the employer is entitled to consider such workman having voluntarily resigned form his job."

The real issue therefore would be whether on the facts of this case the Standing Order would apply insofar as the Respondent is concerned. At this stage, I will not deal with the other contentions such as the Standing Order could not apply in case of permanent workmen. The issue No.1 was whether the Respondent was unable to join duties from 3rd November 1985 to 21st November 1985 on account of sickness as alleged. The other issue was whether the respondent on 21-11-1985 was wrongly prevented from continuing his duty in the second half of the day. The finding on this aspect is essential because for Standing Order 24-A(ii) to apply the workman must be absent without intimation or prior permission for a period exceeding 30 days. On an appreciation of the evidence, the learned Tribunal held that the Respondent had reported for duties on 21-11-1985 in the morning session. That

the workman had reported for the afternoon shift also but had left after attending duty in the afternoon. The Industrial Tribunal also held that the workman had been unable to show that he was prevented from continuing his duties in the second half as per the order of the Depot Manager. However, insofar as his absence from 22-11-1985 to 3-1-1986 is concerned, on considering the evidence the learned Tribunal cam to the conclusion that during the period from 22-11-1985 to 3-1-1986 the workman had informed the employer that he was unable to attend his duties because he was prevented from doing so by the security assistant as per the order of the Depot manager and this was communicated by letter of 21-11-1985 which was received by the employer on 23/24th November, 1985 and also by the reply dated 5-1-1985 in answer to the charge-sheet. The Tribunal further held that the receipt of the letter dated 21-11-1985 and the reply dated 5-12-1985 have been admitted by the employer. The Tribunal therefore held that the workman had intimated his absence to the employer after 21-11-1985 and had also given reasons. The Tribunal held that whether the workman was really prevented form continuing his duty on 21-11-1985 is entirely a different issue. The medical certificate produced by the workman that he had been sick from 24-11-1985

to 19-1-1986 has also been taken on record. Considering these findings, the learned Tribunal held that the Petitioner had failed to show that the workman had been absent for continuous period of thirty days without prior permission or intimation and accordingly held that the Standing Order would not apply. The learned Tribunal also held that the termination would amount to retrenchment and consequently the Order.

With the above, let us first consider whether considering the finding recorded on the workman being absent for thirty days can be interfered with. The finding recorded by the Tribunal is based on the evidence before the Tribunal which evidence has been considered and a finding recorded. The finding is based on the material. It is not the contention of the Petitioner that the evidence led has not been considered and/or extraneous material has been considered and/or findings are perverse. Appreciation of evidence was within the jurisdiction of the learned Tribunal. On appreciation of evidence on record, a finding has been recorded. There is no perversity in the finding. In these circumstances it would be difficult to interfere with the said finding recorded by the Tribunal that

the Respondent herein intimated to the Petitioner as to why he cold not join duties and consequently that the Standing Order relied on by the Petitioner to hold that the employment of the Respondent with the Petitioner had come to an end was unsustainable.

8. The next question is whether the Standing Order itself would apply assuming that the Petitioner had remained absent for thirty days. As can be seen from the Standing Order itself the termination of voluntary resignation is not as a matter of course. The employer is entitled to consider such workman as having voluntarily resigned. In other words, what the Standing Order means is that in case where the workman remains absent without intimation or prior permission for a period exceeding thirty days, it is open to the employer to consider such workman as having voluntarily resigned from his job. If the Employer seeks to avail of the Standing Order, it would contemplate giving a show cause notice to the workman as to why the employer should not consider that the workman had resigned from the job. Admittedly, in the instant case, this was not done and consequently on this count itself the Standing Order would not apply. Similar Standing Orders have been construed by the Apex Court in various

judgments. We shall advert to some of the judgments in order to correctly appreciate what would be in issue. In **Uptron India Limited v. Shammi Bhan and another** [1998(1) CLR 1043] a similar Standing Order was construed by the Apex Court. After considering the Standing Orders and various other judgments the Apex Court in paragraph 15 observed as under:-

> "15. Conferment of 'permanent' status on an employee guarantees security of tenure it is now well settled that the services of permanent employee, whether employed by the Government, or Govt.. company or Govt. instrumentality or Statutory Corporations or any other "Authority" within the meaning of Art. 12, cannot be terminated abruptly and arbitrarily, either by giving him a month's or three months' notice or pay in lieu thereof or even without notice, notwithstanding that there may be a stipulation to that effect either in the contract of service or in the Certified Standing Orders."

In the instant case, the material on record is that the Respondent was on probation. In the case of **D.K. Yadav v. J.M.A. Industries Ltd. [1993(II) CLR 116]** a similar view had been taken. There the Apex Court held that before taking steps to hold that the workman had resigned from his job it was essential that an opportunity be given to the workman.

9. The next contention is whet her the termination under the Standing Order relied upon would amount to retrenchment. In my view, the issue is no longer **res integra** having been decided by Constitution Bench of the Apex Court in **The Punjab Land Development & Reclamation Corporation Ltd., Chandigarh & Ors. v. The Presiding Officer, Labour Court, Chandigarh & ors.** [1990(II) CLR 1]. After examining the law the Apex Court observed as under:-

> "Applying the above reasonings, principles and precedents, to the definition in Section 2(oo), Act, we hold that retrenchment means the termination by the employer of the services of a workman for any reason whatsoever except those excluded in the Section".

A similar Standing Order was earlier considered in the case of **D.K. Yadav** (supra). The Apex Court held that retrenchment was comprehensive enough to include a case whether termination was on the ground that the workman remained absent without leave. In other words, the termination under Standing Order 24-A(ii) would amount to retrenchment. In the instant case therefore, clearly the termination amounted to retrenchment. The Petitioner failed to comply with the required principles and on that count itself the order of

termination is liable to be set aside.

It is no doubt true that on behalf of the Petitioner, the learned Counsel relied on the judgment in the case of **Buckingham and Carnatic Co.Ltd. v. Venkatiah and anr. (supra).** In my opinion, on the contrary that judgment supports the contention of the Respondent. There also a similar Standing Order was construed. In my opinion, however, that judgment cannot be of any aid and assistance to the Petitioner. While discussing such Standing Order the Apex Court observed as under :-

> " Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. But where parties agree upon the terms and conditions of service, and they are included in certified Standing Orders, the doctrines of common law or considerations of equity would not be relevant."

The Apex Court then observed that before giving effect to the relinquishment of service an opportunity is to be given to the employee to offer explanation. If the said explanation is treated as satisfactory by the management, the inference of termination of service is rebutted and the leave in

question is treated as leave without pay. It is clear therefore before an employer even if resorting to the aforesaid Standing Order has to give an opportunity to the respondent workman. This was not done and consequently the termination under Standing Order amounted to retrenchment.

10. The Petitioner failed to comply with the procedure for retrenchment including notice and payment of compensation and consequently the termination is illegal, null and void apart from failing to comply with the requirements of the Standing Order.

11. For the aforesaid reasons, I find no reason to interfere with the award passed by the Industrial Tribunal and in the light thereof the Petition is dismissed. Rule is discharged. There shall be no order as to costs.

**F.I. REBELLO,J.**

ac.